UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

EASTERN DIVISION

ROBERT BENTLEY,

Plaintiff,

v.

LORENZA HILLIARD, et al.,

Defendants.

No. ED CV 16-2135-R (PLA)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

This Report and Recommendation is submitted to the Honorable Manuel L. Real, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California. For the reasons set forth below, the Magistrate Judge recommends that this action be dismissed without further leave to amend, but without prejudice, for lack of subject matter jurisdiction.

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I.

BACKGROUND

Plaintiff is a *pro se* litigant who filed this action on October 7, 2016, pursuant to Bivens v. Six Unknown Agents, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). (ECF No. 1). The Complaint named as defendants Lorenza Hilliard and Linda Raffignone, both of whom appear to be employees of the Department of Veterans Administration ("VA"). (*Id.* at 1-3; see also ECF Nos. 1-2, 1-3). Plaintiff named the defendants in their individual capacities only. (*Id.* at 1). Plaintiff appeared to be raising claims under the First Amendment arising from changes that defendants made in "plaintiff's rehabilitation plan" after plaintiff filed complaints with elected officials against defendants for the "extreme delay in handling his Veterans Administration Vocational Rehabilitation." (*Id.* at 2-3). Plaintiff subsequently was granted leave to proceed *in forma pauperis* ("IFP"). (ECF No. 12).

The previously assigned Magistrate Judge[1] issued an Order Dismissing Complaint with Leave to Amend on January 25, 2017. (ECF No. 6). In that Order, plaintiff was advised that the Veterans' Judicial Review Act of 1988 ("VJRA") precludes the claims that plaintiff was raising concerning benefits that he had received from the VA. Plaintiff, however, was given leave to amend to show that his claims were not precluded by the VJRA. (*Id.*). Plaintiff failed to timely file a First Amended Complaint, and the previously assigned Magistrate Judge issued an Order to Show Cause why the action should not be dismissed for failure to prosecute. (ECF No. 8). Plaintiff filed a Response on March 14, 2017, in which he asserted that the Court had exceeded its authority in screening the Complaint because plaintiff is not a prisoner and he had not been provided with "notice of the complaint's deficiencies." (ECF No. 9). Plaintiff also filed a First Amended Complaint ("FAC") on that same day, which was the same as his Complaint. (ECF No. 10). The previously assigned Magistrate Judge then dismissed the FAC for the same reasons set forth in the earlier Order Dismissing Complaint with Leave to Amend, and gave plaintiff "one last

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[1] By Order of the Chief Magistrate Judge, this case was reassigned to the below signed Magistrate Judge on April 25, 2018. (ECF No. 14).

opportunity to amend." (ECF No. 11).

The operative pleading, plaintiff's Second Amended Complaint ("SAC"), was filed on September 22, 2017. (ECF No. 13). In the SAC, plaintiff continues to name as defendants Hilliard and Raffignone (*id.* at 1); he once again does not specify their positions or employer. Based on the factual allegations in the SAC, it appears that the defendants are employed by the VA in capacities having the authority to determine "rehabilitation plans" for veterans. (*Id.* at 5). Plaintiff sets forth the puzzling allegation that the actions "were done by defendants not in their official capacity as agents of the United States, but rather, under color of Federal law, clothed with governmental authority but acting without any legal authority." (*Id.* at 4). Plaintiff then cites Weaver v. United States, 98 F.3d 518 (10th Cir. 1996), and concludes that the "VA, and the Secretary of Veterans Affairs, are not defendants." (*Id.*).[2]

Plaintiff contends that his claims arise under Bivens. (*Id.*).[3] In the SAC, plaintiff raises one claim under the First Amendment alleging that his rights were violated because defendants "took action against the plaintiff" in retaliation for "plaintiff's protected speech." (*Id.* at 5, 7). Plaintiff alleges that he filed complaints with two elected officials at an unspecified time, who "sent congressional inquires" to both defendants, also at unspecified times. (*Id.*). Subsequently, on October 8, 2014, defendant Hilliard presented plaintiff with "a new and onerous rehabilitation plan"

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[2] In Weaver, the Tenth Circuit confirmed a district court's finding that it lacked subject matter jurisdiction over a case in which a veteran alleged that VA employees had, among other things, conspired with members of the military to prevent the veteran from receiving appropriate disability compensation. The plaintiff in Weaver sought monetary damages and prosecution of the responsible parties. 98 F.3d at 519. The Tenth Circuit held that the veteran's allegations of conspiracy, fraud, and misrepresentation against individual VA officials did not change the fact that plaintiff's claims "in substance" were "nothing more than a challenge to the underlying benefits decision." 98 F.3d at 520. Accordingly, it is unclear to the Court how the cited case supports plaintiff's allegations or his claims. (ECF No. 13 at 4).

[3] Plaintiff also cites Pollard v. The GEO Group, Inc., 607 F.3d 583, 603, as amended, 629 F.3d 843, 868 (9th Cir. 2010), but this case was reversed by Minneci v. Pollard, 565 U.S. 118, 132 S. Ct. 617, 181 L. Ed. 2d 606 (2012). Moreover, the case has no applicability to plaintiff's claims because the defendants herein appear to be federal government employees rather than privately employed individuals working in a privately operated facility for the federal government as is the case in Pollard. (See ECF No. 13 at 4).

that was "created in violation of VA regulations" because it was not "developed in agreement with the veteran." (*Id.* at 5). Plaintiff has a disability, and the change in his rehabilitation plan required activities that were "physically painful and difficult" for him. (*Id.* at 6). Further, because of the actions of defendants, "plaintiff was not able to continue with the Veterans Administrative Vocational Rehabilitation." (*Id.* at 7). Plaintiff seeks monetary damages. (*Id.* at 8).

Because plaintiff is proceeding IFP in this action, the Court has screened the SAC pursuant to 28 U.S.C. § 1915(e)(2) prior to ordering service for the purpose of determining whether the action is frivolous or malicious; or fails to state a claim on which relief may be granted; or seeks monetary relief against a defendant who is immune from such relief. Section 1915(e)(2) applies to any action by a litigant who is proceeding IFP. See, e.g., Shirley v. Univ. of Idaho, 800 F.3d 1193 (9th Cir. 2015) (citing 28 U.S.C. § 1915(e)(2) and noting that a "district court shall screen and dismiss an action filed by a plaintiff proceeding *in forma pauperis*"); Lopez v. Smith, 203 F.3d 1122, 1127, n.7 (9th Cir. 2000) ("section 1915(e) applies to all *in forma pauperis* complaints" and "district courts [should] dismiss a complaint that fails to state a claim upon which relief may be granted") (en banc).

II.

STANDARD OF REVIEW

The Court's screening of a pleading under the foregoing statute is governed by the following standards. A complaint may be dismissed as a matter of law for failure to state a claim for two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990); see also Rosati v. Igbinoso, 791 F.3d 1037, 1039 (9th Cir. 2015) (when determining whether a complaint should be dismissed for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B), the court applies the same standard as applied in a motion to dismiss pursuant to Rule 12(b)(6)). Further, with respect to plaintiff's pleading burden, the Supreme Court has held that: "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. ... Factual allegations must

be enough to raise a right to relief above the speculative level." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 1964-65, 167 L. Ed. 2d 929 (2007) (internal citations omitted, alteration in original); see also Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (To avoid dismissal for failure to state a claim, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." (internal citation omitted)). Since plaintiff is appearing *pro se*, the Court must construe the allegations of the pleading liberally and must afford plaintiff the benefit of any doubt. See Karim-Panahi v. Los Angeles Police Dep't, 839 F.2d 621, 623 (9th Cir. 1988). Finally, in determining whether a complaint states a claim on which relief may be granted, allegations of material fact are taken as true and construed in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the "tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Iqbal, 556 U.S. at 678.

In addition, the Court has a *sua sponte* and "independent obligation to determine whether subject-matter jurisdiction exists." See, e.g., Arbaugh v. Y&H Corp., 546 U.S. 500, 514, 126 S. Ct. 1235, 163 L. Ed. 2d 1097 (2006). The Court may dismiss a suit *sua sponte* and without notice for lack of subject matter jurisdiction. See Scholastic Entm't, Inc. v. Fox Entm't Group, Inc., 336 F.3d 982, 985 (9th Cir. 2003); see also Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) (holding that a court must have jurisdiction to reach the merits). Here, plaintiff will be provided notice of dismissal with this Report and Recommendation.

III.

DISCUSSION

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by Constitution and statute.'" Gunn v. Minton, 133 S. Ct. 1059, 1064, 185 L. Ed. 2d 72 (2013) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377, 114 S. Ct. 1673, 128 L. Ed. 2d 391 (1994)). "A federal court is presumed to lack jurisdiction in a particular case unless

the contrary affirmatively appears." Stevedoring Servs. of Am., Inc. v. Eggert, 953 F.2d 552, 554 (9th Cir. 1992). In addition, a plaintiff must present a federal question on the face of a complaint. See Rivet v. Regions Bank of La., 522 U.S. 470, 475, 118 S. Ct. 921, 139 L. Ed. 2d 912 (1998); Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1086 (9th Cir. 2009) (in order for a federal court to exercise federal question jurisdiction, "the federal question must be disclosed upon the face of the complaint" (internal quotation marks omitted)). Finally, the Constitution grants to Congress the power to control federal court jurisdiction, and "Congress is under no obligation to confer jurisdiction upon inferior federal courts equally." Veterans for Common Sense v. Shinseki, 678 F.3d 1013, 1019 (9th Cir. 2012) (en banc) (citing Sheldon v. Sill, 49 U.S. (8 How.) 441, 449, 12 L. Ed. 1147 (1850)).

Pursuant to the VJRA, 38 U.S.C. § 511(a) provides:

> The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

The Ninth Circuit has held that, with the VJRA, Congress has "created a scheme conferring exclusive jurisdiction over claims *affecting* veterans' benefits" to the Veterans Court, and the Veterans Court has "exclusive jurisdiction" to review decisions regarding veterans' benefits. Veterans for Common Sense, 678 F.3d at 1020-22 (emphasis added). Further, the Ninth Circuit has held that Section 511(a) precludes district courts in the Ninth Circuit from adjudication of state tort claims against a VA employee "because adjudication of those claims would necessitate a consideration of issues of law and fact involving the decision to reduce [the veteran's] benefits." 678 F.3d at 1023 (citing Hicks v. Small, 69 F.3d 967, 969 (9th Cir. 1995) (internal quotation marks omitted)). Similarly, the VJRA precludes a district court from reviewing claims challenging the VA's interpretation of a regulation that impacts the provision of disability benefits. *Id.* (citing Chinnock v. Turnage, 995 F.2d 889, 893 n.2 (9th Cir. 1993)). Accordingly, "review of decisions made in the context of an individual veteran's VA benefits proceedings are beyond the jurisdiction of federal courts." Veterans for Common Sense, 678 F.3d at 1023-24. As the Ninth Circuit has

held, judicial review is precluded "even if the veteran dresses his claim as a constitutional challenge." *Id.* (citing, e.g., Hicks v. Veterans Admin., 961 F.2d 1367, 1369-70 (8th Cir. 1992) (veteran's claim that his benefits were reduced because he exercised his First Amendment rights was ultimately a "challenge to a decision affecting benefits" and was precluded by § 511)). Accordingly, the Ninth Circuit concluded that it lacked jurisdiction to afford relief on claims arising from alleged delays in the provision of mental health care and disability compensation by the VA because, with the enactment of the VJRA, "Congress, in its discretion, has elected to place judicial review of claims related to the provision of veterans' benefits beyond our reach and within the exclusive purview of the United States Court of Appeals for Veterans Claims and the Court of Appeals for the Federal Circuit." Veterans for Common Sense, 678 F.3d at 1016; see, e.g., Demoruelle v. Pfeffer, 671 Fed. Appx. 1002, 1003 (9th Cir. Dec. 22, 2016) (finding that a district court had properly dismissed an action seeking damages as well as injunctive relief for lack of subject matter jurisdiction "because the [plaintiffs'] claims would have required the district court to review a question of fact or law relating to or affecting veterans' benefits decisions") (citable for its persuasive value pursuant to Ninth Circuit Rule 36-3).

Here, plaintiff argues that he has a remedy pursuant to Bivens because his case "is not within the jurisdiction of the Veterans Court or the Federal Circuit because this case does not challenge a decision by the Secretary of Veterans Affairs." (ECF No. 13 at 1). Plaintiff contends that Section 511(a) "does not apply" to his claims because he is not requesting "review of any decision of the Secretary of Veterans Affairs" and he seeks only monetary damages for deprivation of a constitutional right rather than VA benefits. (*Id.* at 2). Plaintiff cites cases from the Federal Circuit Court of Appeal, Broudy v. Mather, 460 F.3d 106 (D.C. Cir. 2006) (*id.*), and Thomas v. Principi, 394 F.3d 970 (D.C. Cir. 2005) (*id.* at 3), but this Court is bound by the decisions of the Ninth Circuit Court of Appeal. Plaintiff also cites Anestis v. United States, 749 F.3d 520, 527 (6th Cir. 2014) (*id.* at 2-3), but that case holds that, where a claim "exists wholly independently of a need for any benefits determination, jurisdiction it is not precluded by Section 511(a)." The claim in Anestis arose from a VA hospital's failure to provide emergency care to a patient who was a veteran, allegedly in violation of VA policy. But that claim did not relate to an

entitlement to any VA benefits because the policy in question required the hospital to provide emergency medical care, regardless of a determination of whether the person in need of care was even a veteran. Anestis, 749 F.3d at 527-28.

Here, it is clear that plaintiff's claims, although raised as a constitutional violation, relate directly to defendants' decisions that affected plaintiff's benefits that he received pursuant to the "Veterans Administration Vocational Rehabilitation" program. (ECF No. 13 at 7). Plaintiff's claims ultimately challenge "a decision affecting benefits." Accordingly, the claims raised in this action are precluded by § 511 because this Court would be required to evaluate "the circumstances of individual" benefits requests made by plaintiff and to determine if the "VA acted properly in handling" plaintiff's request for benefits. See Veterans for Common Sense, 678 F.3d at 1025-28 (noting that, under VA regulations, "benefits" include "any payment, service, . . . or status, entitlement to which is determined under laws administered by the Department of Veterans Affairs pertaining to veterans" (alteration in original)). Plaintiff's argument that only challenges to decisions of the "Secretary of Veterans Affairs" are precluded by the VJRA is unsupported. Although plaintiff cites Veterans for Common Sense, (ECF No. 13 at 2), the Ninth Circuit in that case clarified that Section 511(a) "prohibits review of 'all questions of law and fact necessary to a decision . . . that affects the provision of benefits,'" whereas an earlier statute had prohibited judicial review only of "decisions . . . under any law." 678 F.3d at 1022. Section 511(a) is subject to an exception for review of the decisions of the Secretary by the Federal Circuit. *Id.* The Ninth Circuit, however, has unambiguously stated that Congress disqualified federal courts "from hearing cases related to VA benefits," and that the VJRA limits federal courts' "jurisdiction over anything dealing with the provision of veterans' benefits." Veterans for Common Sense, 678 F.3d at 1023; see also, e.g., Kivalu v. Shulkin, 700 Fed. Appx. 694 (9th Cir. Oct. 30, 2017) (holding that a district court had properly dismissed an action for "lack of subject matter jurisdiction because the United States Courts of Appeals for Veterans Claims and the Federal Circuit have exclusive jurisdiction over *questions that relate to benefits administered by the Veterans Administration*" (emphasis added)) (citable for its persuasive value pursuant to Ninth Circuit Rule 36-3).

Plaintiff also argues that jurisdiction is not precluded because he is seeking monetary

damages rather than VA benefits. (ECF No. 13 at 2-3). This distinction, however, is not relevant to the question of jurisdiction. Recently, in a case in which a veteran challenged the actions of a VA medical provider based on a decision to deny him benefits, and in which the veteran was seeking monetary damages rather than benefits, a district court held that the VJRA precluded federal court jurisdiction because adjudication of the claim would require the "district court to determine whether the VA acted properly in handling a veteran's request for benefits." Peek v. United States, 2018 U.S. Dist. Lexis 68936, at *3, *6 (W.D. Wash. April 24, 2018); see also El Malik v. United States, 2018 U.S. Dist. Lexis 24495 (C.D. Cal. Feb. 14, 2018) (the district court held that it lacked jurisdiction over a negligence claim raised by a veteran with disabilities who was receiving benefits and services from the VA (including through the Vocational Rehabilitation and Employment service) and was seeking monetary damages, because the claim would require the court to review VA decisions that related to benefit decisions).

Finally, to the extent that plaintiff's claims against defendants, who appear to be employees of a federal agency, would not be precluded by the VJRA, plaintiff does not have a Bivens remedy. The Supreme Court has made clear that it is necessary to determine the availability of a Bivens remedy at the earliest possible stage in litigation. Hernandez v. Mesa, 137 S. Ct. 2003, 2006, 198 L. Ed. 2d 625 (2017). Further, the Supreme Court has made clear that "expanding the Bivens remedy is now a disfavored judicial activity." Ziglar v. Abbasi, 137 S. Ct. 1843, 1857, 198 L. Ed. 2d 290 (2017). Finally, the Supreme Court has "never held that Bivens extends to First Amendment claims." Reichle v. Howards, 566 U.S. 658, 663 n.4, 132 S. Ct. 2088, 182 L. Ed. 2d 985 (2012). In addition, the Ninth Circuit recently declined to extend Bivens actions to First Amendment claims. Vega v. United States, 881 F.3d 1146, 1152-53 (9th Cir. 2018) ("we decline to expand Bivens to include Vega's First and Fifth Amendment claims");[4] see also Winstead v.

[4] The Court notes that, although the Ninth Circuit previously held that Bivens might extend to claims under the First Amendment, Moss v. U.S. Secret Serv., 572 F.3d 962, 967 n.4 (9th Cir. 2009), that case was decided before the Supreme Court in Abbasi stated that "expanding the Bivens remedy is now a disfavored judicial activity." Abbasi, 137 S. Ct. at 1857; see also Jesner v. Arab Bank, PLC, 200 L. Ed. 2d. 612, 631 (Apr. 24, 2018) (noting the "Court's general reluctance to extend judicially created private rights of action," and citing Abbasi).

Matevousian, 2018 U.S. Dist. Lexis 73484, at *6 (E.D. Cal. May 1, 2018) (declining to find a Bivens cause of action for First Amendment retaliation claims); Jones v. Hernandez, 2017 WL 5194636, 2017 U.S. Dist. Lexis 186300 (S.D. Cal. Nov. 9, 2017) (declining to extend a Bivens remedy to a First Amendment retaliation claim). Plaintiff raises his challenge herein to the decisions made by defendants in changing plaintiff's rehabilitation plan under the First Amendment. (ECF No. 14 at 3-6).

Accordingly, the Court finds that the VJRA precludes subject matter jurisdiction over plaintiff's claims herein. Plaintiff already has been provided with two opportunities to amend his claims to avoid the preclusion of the VJRA. (See ECF Nos. 6, 11). In addition, because plaintiff lacks a Bivens remedy for his claims as raised in this action, it has become clear to the Court that the deficiencies in plaintiff's claims cannot be cured by further amendment. See, e.g., Rosati, 791 F.3d at 1039 ("A district court should not dismiss a *pro se* complaint without leave to amend unless it is absolutely clear that the deficiencies of the complaint could not be cured by amendment.") (internal quotation marks omitted); Gonzalez v. Planned Parenthood of L.A., 759 F.3d 1112, 1116 (9th Cir. 2014) (a "district court's discretion in denying amendment is particularly broad when it has previously given leave to amend").

The Court therefore recommends that this action be dismissed without further leave to amend, but without prejudice, for lack of subject matter jurisdiction.

IV.

RECOMMENDATION

IT IS THEREFORE RECOMMENDED that the District Judge issue an Order: (1) approving and accepting this Report and Recommendation; and (2) dismissing this action without leave to amend, but without prejudice, for lack of subject matter jurisdiction.

DATED: May 16, 2018

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but are subject to the right of any party to file Objections as provided in the Local Rules Governing Duties of Magistrate Judges, and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.